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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANGELINA OLIVARES, Defendant and Appellant.	B205504 (Los Angeles County Super. Ct. No. BA306492)

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed.

Russell S. Babcock, under appointment by the Court of Appeal for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Lawrence M. Daniels and Sarah J. Farhat, Deputy Attorneys General, for Plaintiff and Respondent.

Angelina Olivares appeals from judgment entered following a jury trial in which she was convicted of voluntary manslaughter (Pen. Code, § 192, subd. (a)) with the finding that she personally used a deadly and dangerous weapon, a claw hammer, within the meaning of Penal Code section 12022, subdivision (b)(1). She was sentenced to prison for 12 years, consisting of the upper term of 11 years plus one year for the weapons enhancement. She contends the upper term sentence imposed violated her rights pursuant to the Sixth Amendment because it was not based on facts found by a jury beyond a reasonable doubt or admitted by appellant. For reasons stated in the opinion we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On July 23, 2006, Antonio Rodriguez was with his brother, his cousin, his uncle Ricky Flores, a friend Louis Tellez, and appellant, drinking beer and eating pizza celebrating Flores's birthday. Appellant and Flores drank beer and margaritas. It was very hot that evening, and appellant opened the windows. The slats on the vertical blinds were open so that the air could come in from the outside.

At approximately 10:00 p.m., appellant said, "Good night . . . I'm going to . . . let you guys go now, it's time for [Flores] to go to bed." She said, "I'm going to put him to sleep now, you guys have to go." When she said she was going to put him to sleep, she "did a little laugh." It was a "furious" or "weird laugh." Appellant seemed "buzzed." "[N]ot drunk and not all there. She was, like, in the middle . . . ." Flores was "the same, as well, in the middle. He was feeling all right." Tellez testified when he left, Flores could not stand up straight or walk straight.

Later that evening, appellant drove to her daughter, Arlene Olivares's house. Appellant entered the house, sat down at the table and cried. She said, "Gato, there was blood."[1] Arlene Olivares, her friend, and appellant drove to appellant's apartment. At the apartment, Arlene Olivares called 911.

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[1] Appellant called Flores "Gato."

During the previous month, appellant had been coming to her daughter Arlene's house and crying. Appellant told her daughter that she and Flores were having difficulties and that she wanted to leave him but did not know how. Appellant stated she was tired of the mental abuse. In July 2006, Arlene Olivares took appellant to a psychiatric appointment and appellant was prescribed medication for depression.

At approximately 2:00 a.m., on July 24, 2006, Montebello Police Officer Mark Ryan responded to a 911 call for help at 210 1/2 North 7th Street in Los Angeles. Inside the apartment, he observed Richard Flores lying on the bed with what appeared to be major head trauma as well as body tissue and blood on the bed and on the wall. The victim's head was on a pillow, his left hand was resting on a bible and a pillow was covering his left hand. A sheet was wrapped over him. The apartment was "extremely hot" and the windows were closed and the blinds were down and closed. A hammer with blood on the handle and head and claw ends was sitting on a pair of folded shorts on a coffee table. The shorts were folded inward and the hammer was resting on the rear portion of the shorts. There was a blood stain on the front portion of the shorts but not on the rear portion. There was blood splatter on all four walls and the ceiling of the room.

Christina Gonzalez, a senior criminalist for the Los Angeles County Sheriff's Department, examined appellant at the Montebello Police Station. There was no blood readily visible on the shirt appellant was wearing, but using a flashlight and from one or two feet away, Gonzalez discovered small blood stains on the front of the shirt. The majority of the stains were centered around the right side of the shirt rather than the left. It was stipulated the blood was that of the victim. Gonzalez examined appellant's body closely and with the same flashlight and did not observe any blood on any part of her body. Appellant did not have any injuries to her face or body.

Mr. Flores died from cranial cerebral trauma, trauma to the brain, to the skull, and to the associated tissues. There were several lacerations of the skin consistent with blunt force injury on the right side of the forehead and the area of the right eye. There were a number of tears of the skin through which one could see the bones of the skull, which were fragmented, and the brain. Considerable force was necessary to penetrate the skin

and the skull. Using a blunt-force object, one would have to strike the head, with "good, strong blows" to result in this type of injury. Mr. Flores's injuries were consistent with the use of the round part of the hammer. He suffered at least five blows to the head. His only wounds were to his head, and he had no defensive wounds on his body.

Approximately six months before the killing, the victim's mother, Otilia Flores, lent appellant the hammer used in the killing. Approximately one month before the killing, appellant and Flores were at his mother's house arguing and Flores told appellant he was leaving her and that he could not take "this" anymore. Flores said he was not going to pay the rent for the apartment anymore because appellant was never there. Appellant then told Flores she was going to leave him. She said, "If you . . . leave me, I'll kill you." Appellant "made a little dance . . . and then she said 'those green eyes, I'll take them out.'" Appellant then stated "I'm just playing" and started laughing. Approximately one and one half weeks before he was killed, Flores told his mother he was going to leave appellant. He told his mother she did not "know what [he was] going through."

In defense, Dr. Nancy Cowardin, an educational and developmental learning specialist, evaluated appellant and concluded she had a learning disability. Appellant's I.Q. of 74 was considered borderline retarded, and appellant had a mental age of a ten-year-old. Dr. Cowardin described people with these characteristics as being able to solve problems, to plan, to make choices, and to know the difference between right and wrong. When people with these characteristics have to reason, there will be limitations. They may not foresee all consequences. If they are making a plan to do something, they see only what they want to happen. They do not see all the possibilities and they are not prepared for them. They are very surprised when things go awry.

Appellant testified in her own defense that she had been with Flores for five years. During that time, they had arguments but they never threatened each other. During those five years, she worked, bought their food, cooked, cleaned, and washed their clothes while Flores "was hanging out with his friends." Appellant did not leave him, because she loved him. Appellant never said, in front of Flores and his daughter, that she

(appellant) would kill him if he left her. Appellant said she and Flores were going to be together forever. Appellant never, in front of Flores's mother, threatened to kill Flores or to "take out his eyes." Flores got a job two months before he was killed. Appellant and Flores agreed he would pay the rent and appellant would pay for the utilities, food, and car insurance. After Flores got the job, things between appellant and Flores got worse. His attitude toward her changed. He would not eat the food she prepared and complained his clothes were never clean enough.

On the night of the killing, she and appellant had been drinking margaritas. She and Flores were enjoying themselves. At the end of the evening when their guests left, she said she was going to put Flores to sleep because he had to go to work the next day. She did not mean anything evil or that she was going to harm him that night. After the guests left, Flores was angry because he could not find the paperwork he was completing so that he could collect general relief. He yelled at appellant in a loud voice, saying that she "was no good." He called her a "stupid, dumb bitch." Flores wanted appellant to write down addresses from the phone book to show that he was looking for work. Flores was not actually looking for work as he already had a job but wanted it to appear that he was unemployed to qualify for general relief. The blinds in the couples' bedroom were closed in preparation for sleep so that the neighbors could not see into the apartment. The windows were closed so the neighbors would not hear the couple having sex.

Appellant tried to hug Flores when they were in bed and Flores told her "to get the fuck away." Appellant turned over and started crying and then went to the bathroom and took medication to sleep. While appellant was in the bathroom, Flores continued to yell at her and call her names. This hurt her and made her angry. She felt confused, numb, and in a fog and went to the kitchen to retrieve a hammer from under the sink. She was not thinking about killing Flores or that she "might go to jail if [she] hurt [him]." Flores did not "want to shut up" so she went to the bed and hit him with the hammer. Appellant did not remember how many times she hit him. She did not remember changing her shorts or putting the hammer on the shorts she had been wearing. She realized Flores was hurt when she saw blood. She was frightened and went to her daughter's house.

Appellant did not remember the route she drove or the speed at which she drove.

During the course of the investigation, Los Angeles County Deputy Sheriff Robert Martindale interviewed appellant. Appellant stated to him that when she went to bed she tried to fondle Flores and he told her to leave him alone. Deputy Martindale asked her, "Did he just go to sleep, then?" and appellant said, "Yes." Deputy Martindale believed appellant told him that prior to getting up and going to the bathroom, appellant had already fallen asleep. Martindale testified he also believed appellant said she was in the bathroom and heard Flores mumble something.

At the time of sentencing, appellant's counsel argued, "but for the mitigating circumstances . . . this unfortunate death would not have happened, and the circumstances I'm talking about, your honor, is the involvement of alcohol by both parties. [¶] We've heard evidence throughout the trial that alcohol played a substantial part in, basically, the death of the victim. Also, we're talking about the provocation that Mr. Flores himself started which led to his death. [¶] And, finally, your honor, we're also talking about, basically, the mental and verbal abuse that he inflicted on [appellant] during the relationship, in particular, the last two months leading up to his death. [¶] . . . [W]e have a woman here who was 49 years old at the time, who has always been law-abiding, has never had any violent incident or violent act in her entire life, and she has been a mother to not only her own children, but also to Mr. Flores's own children. We've heard from Mr. Flores's own daughter that when she lived with them, she treated Mr. Flores's daughter like her own daughter. [¶] And I know my client . . . and throughout the time . . . she has always been very remorseful . . . And when we're asking this court for something that is less than high term, we're not just asking that because that is what we feel is fair, but also according to the sentencing rules . . . because these mitigating circumstances clearly outweigh any aggravating circumstances that were introduced during this trial . . . [¶] [a]nd counsel has laid out some aggravating factors for the court to consider, and I have laid out some case law . . . which basically states that those factors cannot be considered by this court because they are either elements of the crime for

which [appellant] was ultimately convicted of or they are enhancements for which the court will impose another consecutive sentence."

In response, the prosecutor argued that recent Supreme Court cases illustrate the court could impose the upper term if that is what it chose and continued, "Even if [the court was] following the old law, I've pointed out at least one factor in aggravation that the court can consider, and that would be not imposing the weapons enhancement and you can consider that as a factor in aggravation. [¶] I think this is way more egregious than your standard manslaughters, and I think the upper term is more than reasonable in this case."

Thereafter the court sentenced appellant to the high term of 11 years plus one year consecutive for the weapons use enhancement. The court stated it elected to impose the high term, "noting the following factors in aggravation: that the victim was particularly vulnerable in this case, the court being privy to the evidence presented in this case; and the manner in which the crime was carried out indicates planning, sophistication."

DISCUSSION

Appellant contends selection of the upper term based on the fact that the victim was particularly vulnerable and that the manner in which the offense was carried out involved planning and sophistication violated his Sixth Amendment rights as held in *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*).

Appellant's crime was committed in July 2006. In January 2007, the United States Supreme Court rendered its decision in *Cunningham*, holding that California's determinate sentencing law violated a defendant's federal constitutional right to a jury trial by assigning to the trial judge rather than to the jury the authority to find the facts relied upon to impose an upper term of imprisonment.

Thereafter, the California Legislature passed Senate Bill No. 40 (2007-2008 Reg. Sess.) section 3, effective March 30, 2007, to provide in relevant part, "(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the

probation officer's report, other reports . . . and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. . . ."

On July 19, 2007, the California Supreme Court in *People v. Sandoval* (2007) 41 Cal.4th 825, concluded it was appropriate to proceed under the provisions adopted by the Legislature on those cases remanded for resentencing.

Appellant was sentenced on December 13, 2007,[2] after Penal Code section 1170, subdivision (b) was amended and after the opinion in *Sandoval*. The trial court stated its reasons for imposing the upper term were that the victim was particularly vulnerable and the manner in which the crime was carried out indicated planning and sophistication. Appellant was not sentenced under the sentencing scheme found unconstitutional and the court's sentencing of appellant in compliance with the amended statute did not violate her constitutional rights under *Cunningham*. (See *People v. Wilson* (2008) 164 Cal.App.4th 988, 992.)

Appellant contends that to the extent the trial court relied on the 2007 amendments to Penal Code section 1170, which were enacted after the commission of appellant's offenses, but prior to her sentencing, the retroactive application of these statutory amendments violated the prohibition against ex post facto laws and violated due process. She acknowledges our Supreme Court in *Sandoval* rejected similar claims. *Sandoval* concluded, "that the federal Constitution does not prohibit the application of the [Sen. Bill No. 40] revised sentencing process . . . to defendants whose crimes were committed

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[2] While the reporter's transcript states the sentencing hearing was held on January 18, 2008, the clerk's transcript and other references in the reporter's transcript indicate the sentencing occurred on December 13, 2007.

prior to the date of [this decision.]" (*Sandoval*, *supra*, 41 Cal.4th at p. 857.) The court observed, "[a] law violates the ex post facto clause only, if it is retroactive–that is, if it applies to events occurring before its enactment–and if its application disadvantages the offender. [Citation.] A retroactive law does not violate the ex post facto clause if it 'does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance."' [Citations.]" (*People v. Sandoval*, *supra*, 41 Cal.4th 825, 853.) As the *Sandoval* court observed, the question of whether a change in a law that might have some effect on a defendant's term of imprisonment violates ex post facto principles is a "matter of degree." (*Sandoval* at p. 854.) "[T]he removal of the provision calling for imposition of the middle term in the absence of any aggravating or mitigating circumstance is not intended to–and would not be expected to–have the effect of increasing the sentence for any particular crime. . . . Moreover, . . . the difference in the amount of discretion exercised by the trial court in selecting the upper term under the former DSL, as compared to the scheme we adopt for resentencing proceedings, is not substantial." (*Id*. at p. 855.)

Sandoval also concluded that sentencing under the amended Penal Code did not violate due process even if the defendant committed the crime before the amendment. The court explained the defendant was put on notice by the criminal statute which specifies the maximum sentence that may be imposed. Penal Code section 193, subdivision (a) provides that voluntary manslaughter is punishable by imprisonment in the state prison for 3, 6, or 11 years and appellant was, therefore, on notice she could be sentenced to 11 years for the crime.

Appellant also contends the court's selection of the upper term constituted an abuse of discretion. "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.] Second, a '"decision

will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

Contrary to appellant's claim, the record establishes victim Flores was particularly vulnerable. At the time his guests left, Flores was so intoxicated he could not stand up or walk straight. Further, the position of his body, his wounds and the fact that appellant had no injuries to her body indicate Flores was attacked either while he was asleep or deeply incapacitated. Imposition of the upper term did not constitute an abuse of discretion.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.